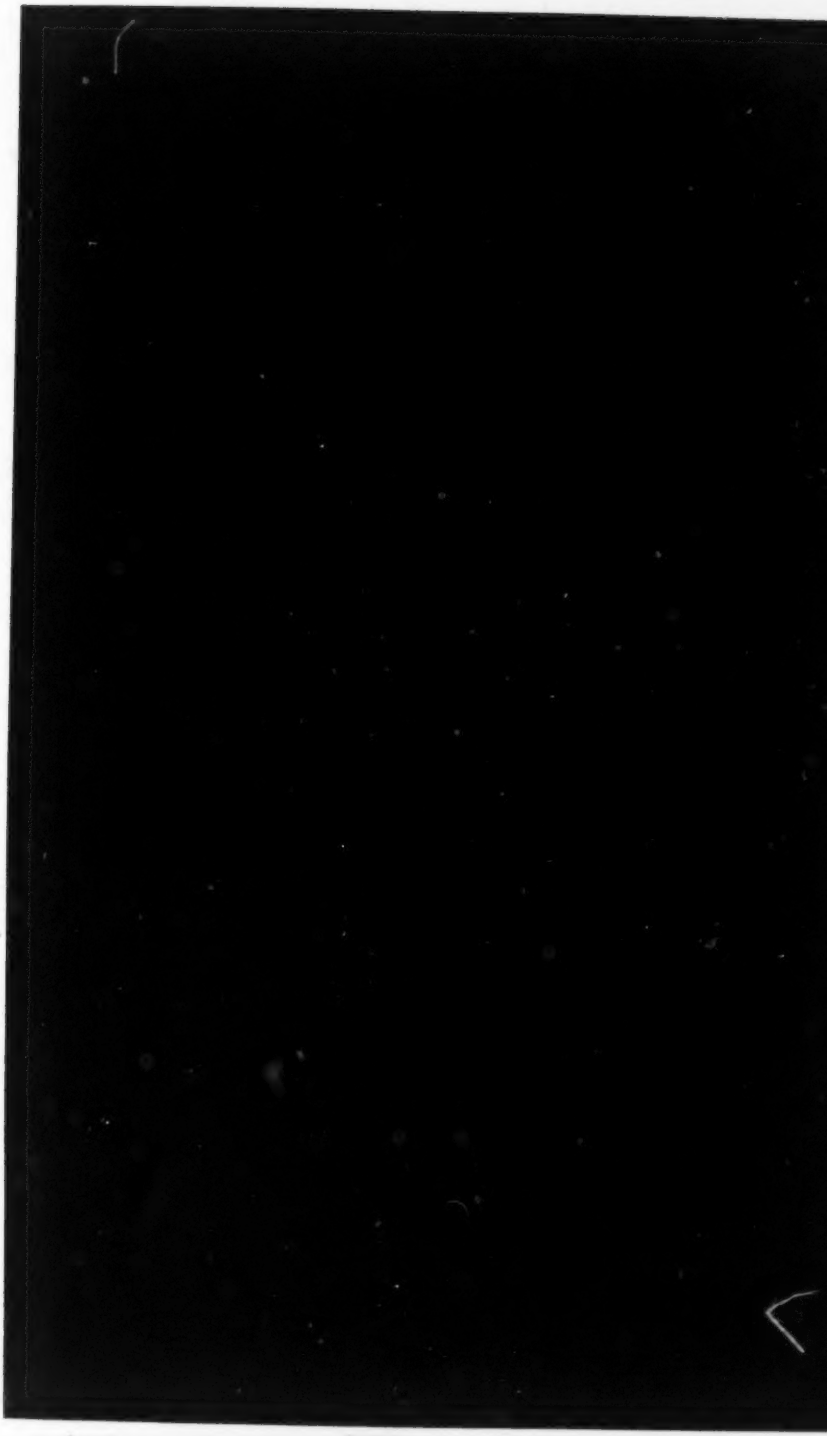


BLEED THROUGH

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INDEX

	Page
I. The finding that the continuation of the administrative proceedings would have caused appellee's credit to be shut off and would disable it from continuing its operations is not supported by the evidence	3
II. Neither the statute nor the Constitution are violated by construing Section 405 (b) to permit maximum disallowances as great as the entire unauthorized payroll	10
A. Section 405 (b) authorizes the disallowance of the entire illegal payroll, not merely of the unauthorized portion of the wages	11
1. Section 405 (b) is substantially identical with Section 5 of the Stabilization of 1942, which, as Congress knew, had been construed as authorizing the disallowance of the entire unauthorized payroll	12
a. The administrative practice under Section 5 of the Stabilization Act of 1942	12
b. Congressional acceptance of this administrative interpretation of Section 405 (b)	16
2. Events following the enactment of the Defense Production Act of 1950 indicate Congressional adherence to the interpretation permitting disallowance of the entire illegal payroll	19
B. The statutory disallowance scheme is not unconstitutional	22
III. No improper delegation of legislative power is contained in the statutory scheme of wage stabilization enforcement established by Section 405 (b)	25
A. Congress may utilize administrative procedure to impose the disallowance sanction	25
B. Section 405 (b) provides sufficient guidance as to the sanction to be imposed	27

291511—54——1

Page

IV. The disallowance sanction is not in conflict with the requirement of Art. I, Section 9, of the Constitution that all direct taxes not covered by the Sixteenth Amendment be apportioned 31
1. An income tax is not a direct tax to the extent that it is based upon business income .. 32
2. The granting of deductions for business expenses is completely within legislative control 34
V. The absence of recitals as to industry consultation does not affect the validity of the instant procedural regulations 37
VI. The resignation in December, 1952, of the industry members of the Wage Stabilization Board has no relationship to this proceeding 42
VII. The regulations are not invalid as retroactive 45
Conclusion 47

CITATIONS

Cases:

American Power Co. v. *S. E. C.*, 329 U. S. 90 28
Beacon Marine Co., In re (Ocean Marine Repairs, Inc.), Labor Relations Reporter Binder 7, WHM 100:1200 ... 11
Boz Inc., In re, June 29, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100:1167 21
Brushaber v. *Union Pacific R. R.*, 240 U. S. 1 33
Commissioner v. *Flowers*, 326 U. S. 465 ..... 19, 30
Commissioner v. *Weisman*, 198 F. 2d 221 36
Continental Can Co. In re, Labor Relations Reporter Binder 7, WHM 100:1198 11
Cosden Petroleum Corp., 16 Labor Relations Reporter 741 (June 30, 1945) 14
Deputy v. *du Pont*, 308 U. S. 488 34
Doyle v. *Mitchell Bros., Inc.*, 247 U. S. 179 35
Estep v. *United States*, 327 U. S. 114 27
Flint v. *Stone Tracy Co.*, 220 U. S. 107 33
Glascote Products Co., In re, June 3, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100:1164 21
Grand Central Aircraft Co., Inc. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO), Region 6, In the Matter of, Case No. 21–CA–1101, 103 N. L. R. B. No. 101 2
Grand Central Aircraft Co., Inc. (Employer) and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO) (Petitioner), In the Matter of, Case No. 21–RC–1813, 103 N. L. R. B. No. 101 2

BLEED THROUGH

BLURRED COPY

Cases—Continued

	Page
Hampton & Co. v. *United States*, 276 U. S. 393	28
Hedin Construction Co., In re, April 11, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100:1153	21
Helvering v. *Bankline Oil Co.*, 303 U. S. 362	34, 36
Helvering v. *Winmill*, 305 U. S. 79	19, 20
Hirabayashi v. *United States*, 320 U. S. 81	31
Hofferbert v. *Anderson Oldsmobile, Inc.*, 197 F. 2d 504	36
Howard Menu Service, 13 Labor Relations Reporter 687 (January 28, 1944)	14
Interstate Transit Lines v. *Commissioner*, 319 U. S. 590	34
Lichter v. *United States*, 334 U. S. 742	27, 28, 31
Lilly v. *Commissioner*, 343 U. S. 90	35
McDonald v. *Commissioner*, 323 U. S. 57	34
Missouri Pacific Railway Co. v. *Tucker*, 230 U. S. 340	23
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41	3
New Colonial Tea Co. v. *Helvering*, 292 U. S. 435	34
Norfolk-Newport News Contractors', 15 Labor Relations Reporter 237 (October 14, 1944)	14
Norman-Frank, Inc. v. *Arnall*, 196 F. 2d 502	41
Norwegian Nitrogen Co. v. *United States*, 288 U. S. 294	19, 30
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320	27
Opp Cotton Mills v. *Administrator*, 312 U. S. 126	28
Oval & Koster, 16 Labor Relations Reporter 741 (June 30, 1945)	14
Parker Appliance Co., 13 Labor Relations Reporter 582 (Regional Board Decision)	14
Parkland Sportswear Co., 13 Labor Relations Reporter 503 (December 1, 1943)	14
Passavant v. *United States*, 148 U. S. 214	27
Pollack v. *Farmers' Loan & Trust Co.*, 158 U. S. 601	32
St. Louis, Iron Mountain & Southern Railway Company v. *Williams*, 251 U. S. 63	23
Southwestern Tel. and Tel. Co. v. *Danaher*, 238 U. S. 482	24
Spaulding v. *Douglas Aircraft Co.*, 154 F. 2d 419	31
Stanton v. *Baltic Mining Co.*, 240 U. S. 103	33, 36
Stratton's Independence v. *Howbert*, 231 U. S. 399	33, 36
Sullenger, Lela, 11 T. C. 1076	36
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381	28
Switchmen's Union v. *Mediation Board*, 320 U. S. 297	27
Textile Mills v. *Commissioner*, 314 U. S. 326	35
United States v. *Biwabik Mining Co.*, 247 U. S. 116	36
United States v. *Ju Toy*, 198 U. S. 253	27
United States v. *Rock Royal Co-op.*, 307 U. S. 533	28
Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503	36
Wadley Southern R. Co. v. *Georgia*, 235 U. S. 651	24

Cases—Continued Page

Weather-Seal Manufacturing Co. v. *Commissioner*, 16 T. C. 1312, affirmed without opinion, 199 F. 2d 376 ..... 35, 37
White v. *United States*, 305 U. S. 281 34
Woodworth, N. A. v. *Kavanagh*, 102 F. Supp. 9, affirmed on the opinion of the District Court, 202 F. 2d 154 35
Yakus v. *United States*, 321 U. S. 414 28
Zehrig, J. C., 16 Labor Relations Reporter 742 (June 30, 1945) 14

Constitution, Orders, Regulations and Statutes:
Constitution of the United States, Art. I, Section 9 32
Sixteenth Amendment 32
Executive Order No. 9322 of March 26, 1943 (8 F. R. 3807) 14
Executive Order No. 9334 of April 19, 1943 (8 F. R. 5423) 14
Executive Order No. 10434 (18 F. R. 809) 45
General Order No. 15, Section 4 (b) 5, 20, 38
General Order No. 18 38
General Order No. 19 (17 F. R. 11368) 42
Enforcement Regulation No. 1, 16 F. R. 6028 ..... 20, 38
General Wage Stabilization Regulation No. 1, 16 F. R. 816 46
National War Labor Board Regulations of September 15, 1944, Section 802.73 (c), 9 F. R. 11422 14
Office of Economic Stabilization Regulations:
October 27, 1942, 7 F. R. 8748:
Section 4001.4 15
Section 4001.10 ..... 12, 13, 15
Section 4001.10, superseded October 1, 1943, 8 F. R. 11960 13
As amended November 30, 1942:
Section 4001.5, (a), 7 F. R. 10024 14
As amended November 30, 1944:
Section 4001.15, 9 F. R. 14547 13
Revised General Procedural Regulation No. 1 38
T. D. 5186 of December 2, 1942, Section 102.28, 7 F. R. 10056 15
T. D. 5243 of March 12, 1943, 8 F. R. 3158 15
T. D. 5435 of February 2, 1945, Section 1002.28, 10 F. R. 1475 15
T. D. 5446 of March 17, 1945, 10 F. R. 3008 15
Treasury Regulations 111, Section 29.23a–16, 26 C. F. R. 29.23a–16 ..... 15, 19
War Food Administration Regulations of January 17, 1944, Section 1100.15, 9 F. R. 659 15
War Food Administration Regulations of June 23, 1945, Section 1100.15, 10 F. R. 7615 15

BLEED THROUGH

BLURRED COPY

Constitution, Orders, Regulations and Statutes—Continued

	Page
Defense Production Act of 1950:	
Section 403 (b)	40, 43
Section 404	41
Section 405 (b)	11, 19, 23, 29, 44
Section 703	44
Section 709	37, 38, 41
Section 715	11
Defense Production Act Amendments of 1951	21, 37
Defense Production Act Amendments of 1952	21
Emergency Price Control Act of 1942:	
Section 2 (a) (50 U. S. C. App. 902 (a))	40
Internal Revenue Code, Sec. 23 (a) (1) (A)	34
Stabilization Act of October 2, 1942:	
Section 5	19, 29
Miscellaneous:	
96 Cong. Rec. 12176	38
96 Cong. Rec. 14064–14065	38
97 Cong. Rec. 8555	20
Federal Rules of Civil Procedure, Rule 52	3
Hearings before the Committee on Banking and Currency, United States Senate, 79th Cong., 1st Sess., on S. J. Res. 30, p. 216	18
Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., on the National War Agencies Appropriations Bill for 1945, pp. 240–241	16, 17
Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 79th Cong., 1st Sess., pp. 12–13	18, 19
Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 78th Cong., 2d Sess., on H. R. 4879, pp. 132–133	17
National Wage Stabilization Board, The, January 1, 1946–February 24, 1947, pp. 230–231	13
S. Rept. 2250, 81st Cong., 2d Sess.:	
p. 38	26
p. 39	12
Termination Report of the National War Labor Board, Vol. I, pp. 435–436; Vol. II, p. 749	13



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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 450

ARTHUR P. ALLEN, CHAIRMAN, TWELFTH REGION WAGE STABILIZATION BOARD, ET AL., APPELLANTS

v.

GRAND CENTRAL AIRCRAFT CO., A CALIFORNIA CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANTS

In our main brief, we have discussed the three points necessarily before the Court on this appeal. We have there argued: (1) that the court below lacked equitable powers to enjoin, in view of the well established doctrines of exhaustion of remedy and prematurity; (2) that Section 405 (b) of the Defense Production Act of 1950 provides an administrative means of enforcement of wage stabilization regulations; and (3) that the power to conduct administrative enforcement proceedings continues. The first two of these points were de-

cided, adversely to the Government, by the court below. The third point is important in connection with possible contentions as to the mootness of the cause.

The court below noted (R. 35–36) that appellee had raised other defenses on which it did not pass.[1] Appellee presents these contentions to the Court as additional grounds for sustaining the decision below (Appellee's Brief, pp. 67–90). This brief will deal with these arguments, and show that they are without merit. First, however, we will revert to an aspect of the exhaustion of remedy point upon which we did not elaborate in our main brief, but which now becomes appropriate for discussion in view of certain overstatements of the evidence made by appellee (Appellee's Brief, pp. 9, 19, 91, 97).

[1] In view of the intimations in appellee's brief (pp. 10, 54), that the wage increases here involved were "merit" increases, or increases given "under pressure from their employees or their union representatives", attention is called to the Decision and Order of the National Labor Relations Board in *In the Matter of Grand Central Aircraft Co., Inc. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO), Region 6*, Case No. 21–CA–1101, and *In the Matter of Grand Central Aircraft Co., Inc. (Employer) and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW–CIO) (Petitioner)*, Case No. 21–RC–1813, 103 N. L. R. B. No. 101, presently pending on review in the Ninth Circuit. The Board found that the principal wage increases here involved were unfair labor practices because granted in order to induce the employees to oppose representation by the complaining union.

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I. THE FINDING THAT THE CONTINUATION OF THE ADMINISTRATIVE PROCEEDINGS WOULD HAVE CAUSED APPELLEE'S CREDIT TO BE SHUT OFF AND WOULD DISABLE IT FROM CONTINUING ITS OPERATIONS IS NOT SUPPORTED BY THE EVIDENCE

The court below found (R. 37) that

> * * * the continuance of the threatened administrative proceedings will cause plaintiff's bank credit to be shut off and will disable plaintiff [appellee] from continuing its operations.

Although this finding of fact has no support in the undisputed evidence and is thus not protected by Rule 52, Federal Rules of Civil Procedure, we did not argue the evidentiary point in our main brief,[2] but directed our discussion to the legal issues of general importance which would resolve the questions raised in the entire group of cases of which this is representative. However, in its effort to distinguish this case from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, appellee has placed such stress on this finding, and so overstated the evidence on which it was based, that it has become imperative to challenge the pertinent finding of fact and to reduce the pertinent evidence to its proper proportions. If the evidence is insufficient to support

[2] The Government had assigned as error the district court's finding of irreparable injury, of which this was a part. See Assignment of Error No. 2, R. 38, Specification of Error No. 1, Main Brief, p. 15.

this finding, appellee's argument on irreparable injury in large part disappears. But even if the finding is allowed to stand, the underlying evidence is significant as indicating how speculative a showing of injury would be sufficient to escape from the exhaustion rule. At the very least, the finding must be interpreted in the light of the undisputed evidence on which it rested.

Actually the evidence, far from establishing that the continuance of the proceedings would cause the shutting off of appellee's bank credit, shows that the bank loans had been renewed once before during the pendency of the proceedings; that the holding of the hearing by the Enforcement Commissioner would not affect the bank's credit policy; that the bank might change the terms of the credit *if* the Enforcement Commissioner should recommend a high disallowance figure and if the chances of a modification by the National Enforcement Commission were slight; and above all that in no circumstances would the bank "take injurious action and deliberately wipe a company out" (R. 71). The evidence in question is that of Mr. Lawler, executive vice-president and a member of the loan committee of the Farmer's and Merchant's National Bank of Los Angeles; it comprises only 11 pages of the record (R. 62–72).

Upon direct examination (R. 62–64), Mr. Lawler testified that his bank and two other banks

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extended a substantial credit to appellee which was up for renewal on September 30, 1953; that generally speaking his recommendations were usually and normally followed by the Board of Directors (R. 62–63); and that his recommendation for a renewal of the loan would be negative *if* the Enforcement Commissioner should recommend a disallowance of any amount between $5,000,000 and $750,000 (R. 63–64).[3] Mr. Lawler stated that "*if* an enforcement commissioner of the National Enforcement Commission * * * should make findings and determinations that wages in the amount of $5,000,000 or more should be disallowed for income tax and or an alternatively contract reimbursement purposes for the year 1951" (R. 63), he "would recommend that the bank not extend the credit agreement" (R. 64). In answer to further questioning he stated that the same would be true "*if* the enforcement commissioner's findings and determinations was that the amount of such disallowance should be $3,000,000," $1,000,000 or ¾ of a million dollars,

[3] The entire payroll for the period under consideration amounted to $5,561,484.11, the alleged excessive payment to $959,857.50 (R. 77–78); appellee (Br., p. 8) states that correction of mathematical errors reduces the latter amount to $755,305.50. While General Order No. 15, Section 4 (b) (Main Brief, p. 92) provides that "the usual and general policy shall be to disallow an amount at least equal" to the excess payment, it plainly envisages the imposition of a sanction for a lesser amount, and, as we have shown in our main brief (p. 7, fn. 7), such disallowances have constituted a substantial portion of the cases handled by the National Enforcement Commission.

or if the findings were made by the National Enforcement Commission instead of by the enforcement commissioner (R. 64). Mr. Lawler did not make any statement that the holding of the hearing would impair appellee's credit standing, and there is no evidence in the record to that effect. This in itself disproves the finding that "continuance" of the proceeding "will cause plaintiff's bank credit to be shut off."

Of obvious significance in this connection is the disclosure on cross-examination that the banks' credit to appellee had been extended in December 1952, although the bank knew at that time of the pendency of the instant proceedings and of the resulting potential liability (R. 65–67).[4]

When questioned about the effect of the lifting of the injunction and the concomitant resumption of the proceedings upon appellee's credit standing, the witness did not state that this would result in an automatic or sure withdrawal of the bank credit. To the contrary, he testified that the bank's action would depend, in his opinion, on many contingencies, including the evaluation by counsel of appellee's chances to refute the charge, saying (R. 69):

> That would present, in my opinion, a contingency that would require very serious consideration and depending upon the

[4] The witness also did not deny that the loan had been continued despite a previous disallowance of $548,000 by the Air Force (R. 72, 58–59).

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amounts involved, depending upon the review of the matter by our legal counsel, I would be then in a position where I would have to appraise the degree of the contingency and the size and amount and that might give me cause and it certainly would change the position that the company is now in.

As I understand it, I am advised that the company is now protected by an injunction from further pursuit of this action which involves a sizeable sum of money which might very conceivably effect the financial condition of the company in a serious way. That is all a matter of opinion; I am expressing my opinion.

The contingent significance of Mr. Lawler's views is enhanced by his admission that the "decision is not entirely up to me," that the questions were only as to "what my recommendation would be to my bank" (R. 68). Not even a leading question on redirect examination could cause the witness to commit himself beyond this vague statement (R. 70).[5]

[5] "Mr. LUND. Mr. Lawler, speaking of contingency, I assume, looking at it from your view and the banker's view, with reference to possible recommendations to your Board of Directors, the seriousness of this contingency or potential liability is much greater, is it not, after an enforcement commissioner has heard the case and made recommendations for disallowance in the substantial amount than the seriousness of this contingency before such determination adverse to the company.

"Mr. LAWLER. In my opinion, that would be the case. I haven't made an analysis." (R. 70.)

Nor were his answers with respect to the effect of a recommendation made by the Enforcement Commissioner any more precise. When questioned by counsel for appellant as to what his credit recommendation would be if an adverse determination had been made by the Commissioner and the company had appealed from it with assurances, believed by the witness, that there was a good chance of success, he testified (R. 69):

> Mr. LAWLER. You haven't named an amount involved. I can't answer your question until I know what amounts are in your mind.
>
> Mr. GRONER. Why does the amount make a difference?
>
> Mr. LAWLER. Obviously, if it is 25 cents, it is going to make a difference to $250,000 or two and a half million. My recommendation, if the amount is 25 cents, is going to [be] entirely different than my recommendation if the amount is two and a half million.

When questioned from the bench about a hypothetical recommendation to disallow $500,000, Mr. Lawler disclosed that his testimony that he would recommend against the renewal of the loan had to be taken with more than a grain of salt; that it really meant that he "would recommend that our bank would not renew the agreement *on the present terms and conditions*" (italics supplied) (R. 71–72). This is far from a statement that there

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would be an unconditional cancellation of the loan. And then, in a continuation of his answer, the witness stated that the bank would not "take injurious action and deliberately endeavor to wipe a company out" (R. 71). This in itself refutes the court's finding that (R. 37):

> * * * the continuance of the threatened administrative proceeding will cause plaintiff's bank credit to be shut off and will disable plaintiff [appellee] from continuing its operations.

Mr. Lawler was the only witness who gave testimony with respect to when bank credit might be withdrawn. His testimony was not disputed and no one challenges his credibility. But this testimony must be read in the light of the facts that he was appellee's witness, and that the burden of proving irreparable injury was on appellee.

The finding of the court below must be appraised on the basis of the testimony on which it must have rested. Absolutely nothing in this testimony supports the broad findings which the court made on this issue.

Since the findings has no support at all in the evidence, it is clearly erroneous. At most, the evidence indicates that *if* the Enforcement Commissioner made a large enough award[6] against

[6] Such an unprecedently large disallowance would be unlikely unless the Enforcement Commissioner found that appellee had been guilty of substantially all the violations charged, and that these violations had been deliberate and

appellee, after the hearing the banks would consider changing the terms and conditions of the loans, but not in a manner which would wipe the company out. Such evidence of injury is, we submit, plainly insufficient to warrant a departure from the doctrine of the *Myers* and other cases.

II. NEITHER THE STATUTE NOR THE CONSTITUTION ARE VIOLATED BY CONSTRUING SECTION 405 (b) TO PERMIT MAXIMUM DISALLOWANCES AS GREAT AS THE ENTIRE UNAUTHORIZED PAYROLL

Appellee contends (Br. pp. 73, 83, 86) that Section 405 (b) does not authorize the disallowance of the entire illegal payroll but merely the disallowance of the unauthorized excess, and that, accordingly, regulations issued under Section 405 (b) are in conflict with the statute as to the amount of disallowance. Appellee also argues that, if either Section 405 (b) or the regulations issued thereunder do authorize disallowance of the entire illegal payroll, its constitutional rights have been infringed.

The issues thus raised are abstract. As we have shown, the certification by the National Enforcement Commission of a disallowance larger than the excess wages has been the rare exception (Appellants' Brief, p. 7, fn. 7). Hence, in the absence

intentional (cf. Main Brief, fn. 7, pp. 7–8). In such circumstances, where the irreparable injury asserted by appellee would be contingent upon a deliberate violation of the law, the clean hands doctrine should preclude any relief (cf. Main Brief, fn. 18, p. 29).

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of any indication to the contrary, it cannot be assumed that if in the instant case the administrative processes had been permitted to run their normal course the Commission would have certified a disallowance larger than the excess wages.[6a] That appellee must base its arguments on speculation as to the size of the disallowance emphasizes the prematurity of the points in the case. See the discussion of the legal principles in our main brief (pp. 26–32). Reference might also here be made to the separability clause of the Defense Production Act (Section 715, Appellants' Brief, p. 86), which evidences a clear Congressional desire to limit constitutional challenges to concrete cases. Putting these considerations aside, we will discuss the abstract questions presented.

A. SECTION 405 (b) AUTHORIZES THE DISALLOWANCE OF THE ENTIRE ILLEGAL PAYROLL, NOT MERELY OF THE UNAUTHORIZED PORTION OF THE WAGES

Section 405 (b) gives the President the authority to

> prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded * * *.

Appellee's position is that the statutory language permits only the disallowance of the illegal portion of the wage payments. Since 1942 this language has been consistently construed as providing for the disallowance of the entire wage payment made in contravention of the regulation

[6a] We are advised that the largest disallowance by the National Enforcement Commission in a contested case has been $47,838 (*In re Beacon Marine Co. (Ocean Marine Repairs, Inc.)*, L. R. R. Binder 7, WHM 100: 1200, 1200e), and the largest pursuant to stipulation [illegible]

or order, and not merely of the unauthorized portion thereof. Any doubt as to the meaning of the statutory language is resolved by the legislative history, which fully supports this administrative construction.

1. Section 405 (b) is substantially identical with Section 5 of the Stabilization Act of 1942, which, as Congress knew, had been construed as authorizing the disallowance of the entire unauthorized payroll

As we have pointed out in our main brief (pp. 44–45), when Congress enacted Section 405 (b) it adopted "the language of [Section 5 of] the Stabilization Act of October 2, 1942, respecting the penalties to be applied for violations of the wage and salary stabilization program."[7] Section 5 had been interpreted and applied from the very beginning as authorizing the disallowance of the entire unauthorized payroll. The pertinent regulations repeatedly were brought to the attention of Congress at appropriation hearings and at hearings concerned with the extension of the stabilization legislation. The continued appropriation of funds for the National War Labor Board and the extension of the Act without amendment amount to the legislative ratification of this administrative practice.

a. *The administrative practice under Section 5 of the Stabilization Act of 1942.* Section 4001.10

[7] S. Rep. 2250, 81st Cong., 2d Sess., p. 39.

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of the Office of Economic Stabilization Regulations of October 27, 1942 (Main Brief, p. 88),[8] issued shortly after the enactment of the Stabilization Act, provided expressly that, where wages had been increased in contravention of the Act, the amount to be disallowed was

> the amount of the wage or salary paid or accrued and not merely an amount representing an increase in such wage or salary.

Experience in the actual enforcement of the statute indicated that the strict and unalterable application of this maximum disallowance to each violation was unduly harsh. On July 13, 1943, the National War Labor Board, charged with the enforcement of Section 5, obtained permission from the Economic Stabilization Director, the late Chief Justice Vinson, to take the circumstances surrounding the violation into consideration and to mitigate the amount of disallowance in appropriate cases.[9]

Office of Economic Stabilization Regulations of November 30, 1944, Section 4001.15 (9 F. R. 14547) accordingly provided that although the Act authorized the disallowance of the entire wage payments, extenuating circumstances could

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[8] Section 4001.10 was superseded on October 1, 1943, by the substantially identical Section 4001.15. 8 F. R. 11960.

[9] *Termination Report of the National War Labor Board*, Vol. I, pp. 435–436; Vol. II, p. 749. See also *The National Wage Stabilization Board*, January 1, 1946–February 24, 1947, pp. 230–231.

justify the imposition of a lesser sanction.[10] The few decisions of the National War Labor Board cases in disallowance matters which have been reported indicate that the Board openly publicized and applied the rule that the entire illegal payroll could be disallowed in the absence of mitigating circumstances.[11]

Moreover, the National War Labor Board was not the sole agency charged with the enforcement of the Stabilization Act. The determination of violations of agricultural wages and salaries and the certification of the amounts to be disallowed were assigned to the Secretary of Agriculture,[12] later the War Food Administrator.[13] The Com-

[10] See also National War Labor Board Regulations, Section 802.73 (c), of September 15, 1944, 9 F. R. 11422, providing that where the Enforcement Division finds that the Act has been violated it shall make, in appropriate cases, findings as to the existence of extenuating circumstances, and a recommendation whether less than the full disallowance sanction should be imposed.

[11] For instances in which the entire illegal payroll was disallowed, see, *e. g.*, *Parkland Sportswear Co.*, 13 Labor Relations Reporter 503 (December 1, 1943); *Howard Menu Service*, 13 Labor Relations Reporter 687 (January 28, 1944); *Norfolk-Newport News Contractors*, 15 Labor Relations Reporter 237 (October 14, 1944). For mitigation cases, see, *e. g.*, *Parker Appliance Co.*, 13 Labor Relations Reporter 582 (Regional Board decision); *Oval & Koster*, 16 Labor Relations Reporter 741 (June 30, 1945); *Cosden Petroleum Corp.*, 16 Labor Relations Reporter 741 (June 30, 1945); *J. C. Zehrig*, 16 Labor Relations Reporter 742 (June 30, 1945).

[12] Office of Economic Stabilization Regulations of October 27, 1942, 7 F. R. 8748, as amended by the Regulations of November 30, 1942, Section 4001.5a, 7 F. R. 10024.

[13] Executive Orders No. 9322 of March 26, 1943 (8 F. R. 3807) and No. 9334 of April 19, 1943 (8 F. R. 5423).

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missioner of Internal Revenue was given the dual functions first of administering the Act with respect to salaries in excess of $5,000,[14] and, second, of actually giving effect to the certificate issued by the appropriate agency in the computation of taxes.[15] In all three instances the implementing regulations originally directed the disallowance of the entire illegal payroll;[16] later amendments, however, permitted the disallowance of a lesser amount in the presence of mitigating or extenuating circumstances.[17] One of these regulations, T. D. 5446 of March 17, 1945, governing the effect to be given to certificates of disallowance by the tax authorities, is still in effect, having been embodied in the permanent Income Tax Regulation. Cf. Treasury Regulations 111, Sec. 29.23a–16; 26 C. F. R. 29.23a–16.

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[14] Office of Economic Stabilization Regulations of October 27, 1942, Section 4001.4, 7 F. R. 8749.

[15] Office of Economic Stabilization Regulations of October 27, 1942, Section 4001.10, Main Brief, pp. 87–89.

[16] Agricultural Labor: War Food Administration Regulations of January 17, 1944, Section 1100.15, 9 F. R. 659. Salaries in Excess of $5,000: Commissioner of Internal Revenue, T. D. 5186 of December 2, 1942, Section 1002.28, 7 F. R. 10056. Effect to Be Given Certificates of Disallowance: Commissioner of Internal Revenue, T. D. 5243 of March 12, 1943, 8 F. R. 3158.

[17] Agricultural Labor: War Food Administration Regulations of June 23, 1945, Section 1100.15, 10 F. R. 7615. Salaries in Excess of $5,000: Commissioner of Internal Revenue, T. D. 5435 of February 2, 1945, Section 1002.28, 10 F. R. 1475. Effect to Be Given to Certificates of Disallowance: Commissioner of Internal Revenue, T. D. 5446 of March 17, 1945, 10 F. R. 3008.

b. *Congressional acceptance of this administrative interpretation of Section 405 (b).* As we have shown in our main brief (pp. 46–48), the Stabilization Act was subject to searching Congressional scrutiny on the frequent occasions of its extension and also in connection with the appropriations for the National War Labor Board. Even in the absence of specific proof that Congress was actually advised of the interpretation of Section 405 (b) to the effect that the entire illegal payroll could be disallowed in the absence of mitigating circumstances, it would have to be assumed that Congress knew of this vast body of consistent regulations issued by different agencies and of the actual practice followed by them.

As a matter of fact, however, this interpretation of Section 405 (b) was brought to the attention of various Congressional Committees and explained to them to their satisfaction. Thus, at the hearings held in March 1944 in connection with the National War Agencies Appropriations Bill for 1945, referred to in our Main Brief at page 47, Mr. William H. Davis, Chairman of the National War Labor Board, pointed out to the House Subcommittee:

> So, in the Executive order and the regulations of the Economic Stabilization Director it was provided that the entire amount of wages paid in violation of law would be disallowed, not just the excessive part, but

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> the whole of it would be disallowed by these agencies of Government; provided, however, that the action of the War Labor Board, in cases which we cover, and the Treasury in case of salaries above $5,000, and so forth, gave us the power, if we found extenuating circumstances, to say to what extent those wages will be taken into account.[18]

Later on,[19] Mr. Davis pointed out that the question of disallowing the entire payroll came up only in 5% of the cases tried by the Board. The question whether the entire illegal payroll or only the illegal excess was to be disallowed came up again in June 1944 at the Senate hearings for the 1945 War Agencies Appropriations Bill.[20] After Mr. Freidin, General Counsel of the National War Labor Board, had explained to the Committee that, while the October 27, 1942 Regulations permitted the disallowance of the entire illegal payroll, authority had been obtained from the Director of Economic Stabilization to impose a lesser sanction in the presence of mitigating circumstances, Senator Hayden remarked

[18] Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 2d Sess., on the National War Agencies Appropriations Bill for 1945, pp. 240–241.

[19] *Id.*, at p. 241.

[20] Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 78th Cong., 2d Sess., on H. R. 4879, pp. 132–133.

that it would be arbitrary if an overpayment of $88 in a $3,500 case necessarily led to a $3,500 tax disallowance. Mr. Freidin and Mr. Garrison, a public member of the Board, explained to the Senator that the mitigation practice was designed to prevent such arbitrary results. Senator Hayden summarized these assurances with apparent approval.

> It would be possible, under your procedure, if you say this was done innocently, to waive it entirely. But if you believe it is done deliberately, you want to make the penalty enough to discourage a repetition of the act.
>
> Mr. FREIDIN: Precisely so.

Similar advice as to the operation of the disallowance sanction of Section 405 (b) was given the 79th Congress in connection with the 1945 Extension of the Stabilization Act [21] and the National War Agencies Appropriations Bill for 1946.[22]

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[21] Statement of Mr. William H. Davis, Chairman of the National War Labor Board of March 7, 1945, Hearings before the Committee on Banking and Currency, United States Senate, 79th Cong., 1st Sess., on S. J. Res. 30, p. 216:

> If the tripartite division finds that a violation exists, it considers all such extenuating circumstances in reaching its determination as to the amount of the unauthorized wages to be disallowed. It has been relatively rare in the experience of the Board that the violations by an employer have been deemed sufficiently willful or intentional to justify disallowance of the entire amount of wages paid in violation of the act.

[22] Statement of Dr. George W. Taylor, Chairman of the National War Labor Board, April 23, 1945, Hearings before the Subcommittee of the Committee on Appropriations,

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In these circumstances the repeated extensions of the Stabilization Act and the several appropriations of funds for the operation of the National War Labor Board and later for the National Wage Stabilization Board indicate that Congress, too, interpreted Section 5 of the Stabilization Act as authorizing the disallowance of the entire illegal payroll. And the reenactment of Section 5 as Section 405 (b) of the Defense Production Act carried with it the approval of their earlier interpretation of the statutory language. *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Commissioner* v. *Flowers*, 326 U. S. 465, 469;[23] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 308–315.

2. Events following the enactment of the Defense Production Act of 1950 indicate Congressional adherence to the interpretation permitting disallowance of the entire illegal payroll

On June 13, 1951, the Wage Stabilization Board issued its Enforcement Regulation No. 1, 16 F. R. 6028 (cf. Main Brief, p. 4). Section 1 of this

House of Representatives, 79th Cong., 1st Sess., pp. 12–13, pointing out that while the entire illegal payroll could be disallowed, the Board had authority to reduce or entirely eliminate these potentially severe penalties on the basis of the facts in each particular case.

[23] In connection with the above cited cases dealing with the weight to be given to Treasury Regulations of long standing, it should be remembered that the administrative interpretation of Section 405 (b) authorizing the disallowance of the entire illegal payroll has been embodied in its present form in Treasury Regulations 111, Section 29.23a–16 since 1945 and that it goes back to 1943.

Regulation—like General Order No. 15, Section 4 (b), involved in the instant case (Main Brief, pp. 91–92)—called for the disallowance of the entire wage payment, not merely of the illegal wage increase, in the absence of extenuating or mitigating circumstances.

That Congress was well aware of this Enforcement Resolution appears from the Congressional debates resulting in the Defense Production Act Amendments of 1951. Representative Davis of Georgia quoted the pertinent portion of Enforcement Regulation No. 1 and pointed out, on July 20, 1951 (97 Cong. Rec. 8555), that

> Under the provision as it now is, the entire wage or salary involved may be disallowed * * *.

He introduced an amendment [24] to make (*ibid.*)

> these heavy penalties possible to be invoked only if the violation was intentional, for the period prior to June 30, 1951, because of uncertainty in the administration of the Act prior to that time.

It is significant that Mr. Davis felt that total disallowance was authorized by the statute and that an amendment would be necessary to change it.

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[24] The amendment would have provided in part "That as to any such payments made prior to June 30, 1951, this authority shall extend and be applied only to payments made in willful contravention of any such regulation or order" (97 Cong. Rec. 8555).

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Mr. Spence, the Chairman of the House Committee on Banking and Currency, which was in charge of the bill, objected on the ground that the amendment

> would prevent effective enforcement and destroy the effect we are trying to achieve by this act.

The House thereupon rejected the Amendment (*ibid.*[25]), thereby expressing its approval of the imposition of a disallowance sanction amounting to the entire payroll in appropriate cases.

Congress thereafter extended Section 405 (b) twice.[26] By the time of the last extension (June 30, 1952), the National Enforcement Commission had handed down its first decisions asserting its authority to disallow the entire payroll where warranted by the circumstances. *In re Hedin Construction Co.,* April 11, 1952, Bureau of National Affairs, Labor Relations Reporter Binder 7, WHM 100: 1153, 1163; cf. *In re Glascote Products,* June 3, 1952, *ibid.,* 1164, 1165–1166; *In re Boz Inc.,* June 24, 1952, *ibid.,* 1167, 1168.

The material referred to in the preceding pages shows that before the 1950 Act was passed Congress knew that its predecessor had been consistently construed as permitting disallowances as high as the entire payroll, that Congress

[25] The rejected amendment also would have provided for the judicial review of the determination of the disallowance (cf. Main Brief, pp. 49–50).

[26] Defense Production Act Amendments of 1951 and 1952.

deliberately used this identical language in 1950, and that it specifically refused to amend the Act in this respect when the interpretation was called to its attention, when the Act was extended and otherwise amended. It thus seems clear that this interpretation was both what Congress intended when the Act was passed and ratified thereafter.

B. THE STATUTORY DISALLOWANCE SCHEME IS NOT UNCONSTITUTIONAL

Since for the reasons stated the regulations permitting administrative disallowance up to and including the entire amount of the unauthorized payroll are authorized by the statute, we put to one side appellee's attempt to separate regulation from statute for purposes of constitutional attack.[27] The constitutional challenge must be considered as relating to the statute.

We submit that there can be no doubt that Congress can provide a varying or flexible system of disallowances or sanctions to be imposed in appropriate circumstances. Argument is unnecessary to prove that Congress may impose monetary penalties substantially greater than the amount involved in a particular violation; a fine may exceed the amount stolen. Here, neither statute nor regulation go that far—since the maximum disallowance is the amount of the unlawful wage payment.

[27] If the regulations were not authorized by the statute, the constitutional question would not be reached.

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As we have shown, the disallowance of an entire unauthorized payroll, the maximum permitted by the statute, occurred only in a single case in which there existed "* * * a deliberate and intentional violation after being expressly informed of * * * obligations under the law." Appellants' Main Brief, pp. 7–8, fn. 7. The sanctions applied in the bulk of the cases fell well short of the permitted maximum and were carefully designed to fit the circumstances of each case. *Ibid.* Standards with regard to mitigating or extenuating factors were set forth in wage enforcement regulations at all times and were known to, discussed with, and approved by Congress. *Supra,* pp. 16–22.

Appellee's attack on this system of disallowances, citing *Missouri Pacific Railway Co.* v. *Tucker,* 230 U. S. 340, is based on considerations precisely the opposite of those actually presented. The *Missouri Pacific* decision means no more than that a fixed and arbitrary penalty, to be applied without discretion and without relationship to the circumstances of the particular case, is bad. Here, of course, no such problem arises. On the contrary, Section 405 (b) provides flexibility, the opportunity for the exercise of discretion in particular cases, and the shaping of the sanction to carry out the public policy involved. Far less carefully designed systems have been sustained. Cf. *St. Louis, Iron Mountain & Southern Rail-*

way Company v. *Williams,* 251 U. S. 63, which differs from the *Missouri Pacific* case chiefly in that, just as here, the amount of the sanction lay within the discretion of the enforcing tribunal.

Appellee also cites (Br. p. 79) *Southwestern Tel. and Tel. Co.* v. *Danaher,* 238 U. S. 482, and *Wadley Southern R. Co.* v. *Georgia,* 235 U. S. 651, in support of an argument that the penalties here are unlawfully oppressive. But those cases and the principle for which they stand involve penalties definitely imposed and rapidly accumulating by the day or otherwise. If the carrier violated the law, it would subject itself to these heavily mounting penalties during the period in which the order was being tested in court; whereas if it complied, it would also suffer financial loss. Here there are no cumulative penalties and, indeed, only a possibility of a large tax disallowance, even assuming what has not yet been determined, that appellee has violated the law. The amount does not become greater during the period of litigation. In addition, it does not appear that compliance with the wage ceilings would have been costly; on the face of things, it should have been more economical. The National Labor Relations Board decision in the case cited at page 2, fn. 1, *supra,* implies that what appellee was seeking to avoid was the lawful unionization of its employees.

Such a system permitting the exercise of discretion in determining the amount to be disal-

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lowed, depending on the flagrance of the violation, with the total illegal payroll as a maximum, obviously violates neither the Eighth nor the Fifth Amendments.

III. NO IMPROPER DELEGATION OF LEGISLATIVE POWER IS CONTAINED IN THE STATUTORY SCHEME OF WAGE STABILIZATION ENFORCEMENT ESTABLISHED BY SECTION 405 (B)

Appellee has suggested (Br. p. 88) that Section 405 (b) is unconstitutional on the ground of unlawful delegation. This contention seems to fall into two parts. First, appellee contends that Congress lacked power to utilize administrative procedure for enforcement purposes. Second, appellee charges that Section 405 (b) contains no adequate standard with respect to the sanction to be imposed in the event a violation of wage stabilization regulations is found to have occurred.[28] These contentions have little merit.

A. CONGRESS MAY UTILIZE ADMINISTRATIVE PROCEDURE TO IMPOSE THE DISALLOWANCE SANCTION

As we have shown, Congress deliberately chose an administrative procedure culminating, in the event of violation, in a certification of appropri-

[28] Appellee also argues that the President lacked authority to delegate the enforcement function to the Office of Defense Mobilization after Title IV had expired (Br., pp. 56–58). In support of this contention appellee refers to the provision in Section 403 requiring the President, when he "determines that it is necessary to impose price and wage controls generally over a substantial portion of the national economy" to administer such controls "through a new independent agency created for such purpose." Section 403 itself expired

ate disallowance, as the only effective method of insuring adherence to wage stabilization regulations and orders, a crucial need in a war or emergency economy (Appellants' Main Brief, pp. 41–64). And there can be no doubt that the conscious selection of this enforcement technique, based upon the conclusive experience gained during World War II, was open to Congress.

It is well settled, as a matter of principle, that Congress may, where it deems the method appropriate, rest the enforcement of statutes, up to and including the imposition of sanctions, exclusively with an executive or administrative agency. "* * * Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of

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on April 30, 1953. Moreover, Congress would not have intended to require that the carrying through to completion of enforcement proceedings *after* expiration of Title IV would have to be carried through by a "new" agency. The committee report shows that the reason for requiring the use of a "new" agency was to insure coordination in the administration and enforcement of price, wage and other controls involved in "the various aspects of this vast program." S. Rep. 2230, 81st Cong., 2d Sess., p. 38. Such coordination was obviously desirable during the period of active administration, while the programs were in effect, but it was unnecessary when all that was left to be done was the completion of specific enforcement proceedings against past violations. This does not mean that the expiration of Section 405 (b) precluded the President from authorizing the completion of enforcement by the Office of Defense Mobilization. His authority stems from the savings statutes discussed at pages 66–77 of our main brief, together with the authority conferred upon him by Title VII which does not expire.

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law. * * *." *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, 303; *Estep* v. *United States*, 327 U. S. 114, 120; *Lichter* v. *United States*, 334 U. S. 742.

The availability of this selection of remedy or sanction is not affected by the use, in the enforcement scheme, of a money penalty. "* * * [T]he legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339; see, also, *Lichter* v. *United States, supra; United States* v. *Ju Toy*, 198 U. S. 253; *Passavant* v. *United States*, 148 U. S. 214.

Thus, the power of Congress to utilize administrative enforcement in the wage stabilization program is clear. Congress has certainly gone no further here, where enforcement culminates in the familiar tax collection processes.

B. SECTION 405 (b) PROVIDES SUFFICIENT GUIDANCE AS TO THE SANCTION TO BE IMPOSED

It is also well settled that constitutional prohibitions against unlawful delegation of legislative power are not infringed where Congress has

provided intelligible principles to guide the exercise of the delegated authority. *Lichter* v. *United States, supra; American Power Co.* v. *S. E. C.,* 329 U. S. 90, 104; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126; *Hampton & Co.* v. *United States,* 276 U. S. 393. Flexibility of administration is not only permitted but desirable, particularly where, as here, Congress seeks to deal with a complex and difficult subject under an emergency program. *Lichter* v. *United States, supra; Yakus* v. *United States,* 321 U. S. 414, 423–424; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 574. Charges of unlawful delegation for want of precise standards, such as that leveled by appellee herein, must be approached in the light of these principles.

First, we turn to the language of Section 405 (b). We think that if the problem of construction had to be approached in a vacuum, sufficient guidance would be found to exist in the language of the section itself. By the first sentence of the section, as we have seen (pp. 10–22, *supra*), Congress made illegal the entire wage payment in contravention of a maximum wage regulation. "No employer shall pay, and no employee shall receive, any wage * * * in contravention of any regulation or order promulgated by the President under this title." The second sentence of the section not only provides the method of enforcement, namely, a Presidential directive as to ex-

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ecutive or administrative disallowances, but also creates in the President the power to remit some or all of the illegal payment thus prescribed. Specifically, Section 405 (b) directs the President to prescribe "* * * the extent to which any wage * * * payment made in contravention * * * shall be disregarded * * *."

This statutory enforcement scheme parallels the familiar method of enforcing the criminal law by allowing the court to prescribe a maximum sentence or a lesser sentence in its discretion. This statute is no more unconstitutional as a delegation of legislative power than is that familiar device.

But here the problem cannot be approached in a vacuum. As we have shown, Section 405 (b) was consciously and specifically copied by Congress in 1950 from the substantially identical text of Section 5 of the 1942 Stabilization Act; this 1950 utilization by Congress of the language of the 1942 section took place with actual knowledge of the interpretation and application of the earlier section, in thousands of cases, on every point here material; and Congress was specifically aware of, and approved, the interpretation and application of Section 405 (b) during the Korean emergency period. This close and continuous familiarity with the interpretation and application of Section 5 and Section 405 (b), specifically included knowledge that the statutory language had been construed as permitting the disallowance of the en-

tire illegal payroll of a violating employer as a maximum, with a power to remit or mitigate the amount of sanction to be imposed in appropriate circumstances.[29]

Given these circumstances, no genuine question of delegation arises. On the contrary, there is here presented the clearest possible case of ratification by Congress of the administrative interpretation and application of statutory language precisely reenacted with full knowledge of such prior interpretation and application. *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Commissioner* v. *Flowers,* 326 U. S. 465, 469; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 308–315. The conscious recognition and approval by Congress, in enacting Section 405 (b), of the minutely detailed pattern worked out during World War II with regard to wage stabilization enforcement would, in and of itself, give more than sufficient content to the language of Section 405 (b) in so far as standards are concerned. This means that the words of the statute are to be read as if they expressly authorized the method of determining the amount to be disallowed—described in the antecedent regulation—and copied into the present one.

In far more stringent circumstances than are here present, general congressional approval by statute of prior detailed executive orders and

[29] See Appellants' Main Brief, pp. 6, 92, for a detailing of the factors in mitigation.

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proclamations has been upheld against a charge of unlawful delegation for want of standards. *Hirabayashi* v. *United States,* 320 U. S. 81, 102–104. And this Court has recently held that the adequacy of a statutory standard can be measured by reference to an administrative practice known to the enacting Congress and projected into the statute under enactment. *Lichter* v. *United States,* 334 U. S. 742, 777, 783. The renegotiation field furnishes a strikingly similar sequence of statute, administrative interpretation and reenactment. The *Lichter* decision (pp. 777, 783) followed the reasoning of *Spaulding* v. *Douglas Aircraft Co.,* 154 F. 2d 419, 425 (C. A. 9) that "* * * [w]hatever difficulties may be found in the original act, the amendments of October 21, 1942, merged the detailed administrative practice with the statute in a manner to foreclose all possibility of further doubt." Here both the 1950 Act in relation to the administrative regulation and practice under the 1942 Act and the later amendments and reenactments in relation to the regulation and practice after 1950 merged the detailed administrative practice into the law.

IV. THE DISALLOWANCE SANCTION IS NOT IN CONFLICT WITH THE REQUIREMENT OF ART. I, SECTION 9, OF THE CONSTITUTION THAT ALL DIRECT TAXES NOT COVERED BY THE SIXTEENTH AMENDMENT BE APPORTIONED

On p. 87 of its brief appellee makes an involved argument to the effect that by disallowing deduc-

tions for wages in the computation of its income, its income tax ceases to be levied upon "income" and is outside the scope of the income tax authorized by the Sixteenth Amendment. Accordingly, appellee concludes that the tax is unconstitutional because Art. I, Section 9, of the Constitution requires that all direct taxes be apportioned. There are two short answers to this argument, (1) the taxes levied upon business income, in particular that of corporations, never has been considered a direct tax, and, (2) the "income" specified in the Sixteenth Amendment is gross income; hence, the allowances of income tax deductions for business expenses are a matter of legislative grace.

1. *An income tax is not a direct tax to the extent that it is based upon business income*

The basic premise of appellee's argument is that the income tax levied upon it is a direct tax which requires apportionment unless it comes within the terms of the Sixteenth Amendment. This analysis fails at the very threshold since this Court has held consistently that a tax imposed upon business income is not a direct tax.

Thus, in *Pollack* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, in which the Income Tax of 1894 was held unconstitutional, this Court was careful to point out (at pp. 635, 637) that an income tax is a direct tax only to the extent that it is levied

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upon income derived from real estate and personal property, and refused to comment

> on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Accordingly, the Corporation Tax Act of 1909, which preceded the Sixteenth Amendment, was held constitutional as "an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation." *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 414; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 151–152.

Similarly, the decisions interpreting the Income Tax Acts enacted subsequent to the Sixteenth Amendment are careful to point out that except for their incidence upon income derived from real or personal property, income taxes are in the nature of indirect excise taxes. *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, 16–17; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114. The latter case is of particular import, since it rejected the argument similar to the one advanced here, that an income tax statute which does not allow for an adequate depletion allowance is not authorized by the Sixteenth Amendment.

Since the appellee's income sought to be taxed here is derived from business and not from real

or personal property, the application of the income tax to it would be in the nature of an indirect excise tax, and appellee's reliance on the Sixteenth Amendment is utterly misplaced.

2. *The granting of deductions for business expenses is completely within legislative control*

The second branch of appellee's argument is that the income tax authorized by the Sixteenth Amendment is a tax upon net income and does not permit Congress to disregard any costs of doing business.

Pursuant to Section 23 (a) (1) (A) of the Internal Revenue Code, "a reasonable allowance for salaries or other compensation for personal services actually rendered * * * shall be allowed as deductions." Appellee appears to argue that it has some vested, constitutional right to this deduction and that it is beyond the power of Congress to disallow it. This Court, however, has held consistently that "every deduction from gross income is allowed as a matter of legislative grace" (*White* v. *United States,* 305 U. S. 281, 292; *New Colonial Tea Co.* v. *Helvering,* 292 U. S. 435, 440; *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366; *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593; *McDonald* v. *Commissioner,* 323 U. S. 57, 60), and "does not turn on general equitable considerations" (*Deputy* v. *du Pont,* 308 U. S. 488, 493).

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Moreover, even in the absence of a direct statutory command, deductions for expenses tainted with illegality may be disregarded. *Textile Mills* v. *Commissioner,* 314 U. S. 326, 335–339, and see *Lilly* v. *Commissioner,* 343 U. S. 90, 97, stressing the difference between an unethical and an illegal business expenditure.

Hence, since Congress has the power completely to disallow deductions for wage payments, and since even without a statute wage payments made in violation of anti-inflationary legislation could be disallowed as deductions, Congress without doubt had the power to provide for the disallowance sanction of Section 405 (b). The courts accordingly have upheld tax disallowances which came up under Section 5 of the Stabilization Act of 1942. *Weather-Seal Manufacturing Co.* v. *Commissioner,* 16 T. C. 1312, affirmed without opinion, 199 F. 2d 376 (C. A. 6); *N. A. Woodworth* v. *Kavanagh,* 102 F. Supp. 9 (E. D. Mich.), affirmed on the opinion of the District Court, 202 F. 2d 154 (C. A. 6).

The cases cited by appellee do not hold to the contrary. *Doyle* v. *Mitchell Bros. Inc.,* 247 U. S. 179, involved the extent to which the proceeds of a sale of a capital asset constitute income. This Court held as a matter of statutory interpretation, using the term "income" in its "natural and obvious sense," that the determination of income derived from the sale of property required the deduction from the proceeds of the

sale of an amount equal to the costs of the asset. (247 U. S. at 184, 185.) No constitutional question was involved. There was no occasion to pass on the proposition asserted here by appellee that a statutory computation of income which did not leave the capital investment intact would be unconstitutional. To the contrary, as we have pointed out above [30] this Court has held repeatedly in the related field of wasting assets such as mines or gas that Congress is under no constitutional obligation to provide for a depletion allowance, large enough to restore the capital investment. *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103; *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, 521–526; *United States* v. *Biwabik Mining Co.,* 247 U. S. 116; *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366–367.

Nor is appellee aided by decisions such as *Lela Sullenger,* 11 TC 1076; *Commissioner* v. *Weisman,* 197 F. 2d 221 (C. A. 1); *Hofferbert* v. *Anderson Oldsmobile, Inc.,* 197 F. 2d 504 (C. A. 4). In these instances the tax authorities unsuccessfully sought to disallow as costs of goods sold those portions of the purchase prices paid by the taxpayer which exceeded the OPA ceiling. In all three instances the decisions were largely influenced by the consideration that, in contrast to wage and salary stabilization, prior to the Defense

[30] *Supra,* pp. 33–34.

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Production Act Amendment of 1951 Congress had not expressly provided for tax disallowance in the case of price control violations (main brief p. 50, 61–64). The courts were reluctant, in the absence of an express statutory direction, to sanction a computation of income which did not provide for the reimbursement for capital expenditures.[31]

V. THE ABSENCE OF RECITALS AS TO INDUSTRY CONSULTATION DOES NOT AFFECT THE VALIDITY OF THE INSTANT PROCEDURAL REGULATIONS

Section 709 of the Defense Production Act provides in pertinent part (Appellants' Main Brief, pp. 85–86):

> * * * Any rule, regulation, or order, or amendment thereto, issued under authority of this Act shall be accompanied by a statement that in the formulation thereof there has been consultation with industry representatives, including trade association representatives, and that consideration has been given to their recommendations, or that special circumstances have rendered such consultation impracticable or contrary to the interest of the national defense, but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate.

[31] Cf. the comment on the *Sullenger* case in *Weather-Seal Mfg. Co.* v. *Commissioner*, 16 TC 1312, 1320, affirmed, 199 F. 2d 376 (C. A. 6).

Appellee contends (Br. p. 67) that the procedural regulations, under which the administrative proceedings here involved were to have taken place, violate Section 709 in that they fail to recite that industry consultation took p'ace in connection with their formulation or that such consultation was impracticable. Specifically, the regulations thus attacked are General Orders 15 and 18 and Revised General Procedural Regulation No. 1, described in detail in our main brief at pp. 5–10.[32]

In the first place, Section 709 is not applicable to general procedural regulations such as we have here. The reference to "industry" and "trade association" representatives indicates that Congress was thinking of regulations of particular industries with respect to business practices. See 96 Cong. Rec. 12176–7, 14064–5. Such a reference would not be appropriate for general rules of procedure, as to which business men are not experts and which do not pertain to particular industries. Which trade association representatives and which industries, for example, would

[32] These procedural regulations, covering procedure before the National Enforcement Commission, all stem from Enforcement Regulation No. 1, 16 F. R. 6028 (Appellants' Main Brief, p. 4) which was issued by the tripartite Wage Stabilization Board on June 13, 1951, at which time enforcement was a function of the Board. As we have shown, on July 28, 1952, enforcement was transferred to the National Enforcement Commission, a separate entity created by the Economic Stabilization Administrator. Appellants' Main Brief, p. 5.

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be consulted in framing such procedural regulations?

The establishment of enforcement machinery and procedure is purely governmental business, to be worked out with due regard for controlling rules of law. No one would have expected that business or industrial representatives should be consulted as to the method of proceeding against violators of administrative regulations. The regulations here involved, in summary, provide that the National Enforcement Commission shall determine, on complaint by other governmental agencies, whether the wage stabilization requirements have been violated, describe the procedure to be followed by that Commission (in conformance with customary procedural standards for administrative agencies), and define the policies to be followed by the Commission in determining the amounts to be disallowed in particular cases. Obviously the requirement in Section 709 for consultation with industry and trade association representatives cannot have been meant to cover regulations such as these.

Secondly, the consultation requirement of Section 709 is properly limited to those regulations which pertain to the control of industry and trade, such as the regulation of prices, credit, and the allocation of materials. Wage stabilization, however, imposes ceilings on the wages paid to labor, and thus impinges primarily upon the rights of employees. If Section 709 had been meant to reach the subject of wage stabilization, it presumably

would have required consultation with representatives of labor and not merely with industry and trade association representatives.

A reason why this was not required is disclosed in the framework of the statute. The regulation with respect to prices, priorities and the like was to be by Government officials representing only the public. There was good reason to require such persons to seek the views of the groups to be regulated.

Where wage stabilization was concerned, Title IV established a different and far more direct procedure. Section 403 (b) (1) created the Wage Stabilization Board to be composed "* * * in equal numbers, of members representative of the general public, members representative of labor, and members representative of business and industry. * * *" This provision for direct participation by industry and labor in the promulgation of regulation in the field of wage stabilization would have made further consultation with representatives of industry and labor both unnecessary and repetitious.

A word should be said as to the history of the predecessor of Section 709, Section 2 (a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. 902 (a), which also required consultation with industry.[33] This provision was inapplic-

[33] The pertinent sentence in Section 2 (a) provides that: Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be af-

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able to the wage stabilization program which was created by the subsequently enacted Stabilization Act of 1942, 56 Stat. 765, 50 U. S. C. App. 961, *et seq.* But even with respect to price control, the Emergency Court of Appeals has stated that "we never found occasion to set aside a regulation on this ground [failure to consult with industry], even assuming the provision in question could have been deemed mandatory, and not directory merely." *Norman-Frank, Inc.* v. *Arnall,* 196 F. 2d 502, 504 (E. C. A. 1952), a case under the 1950 Act which cites the cases under the earlier act. The court went on:

> At any rate, the point has been rendered academic by a provision in the Defense Production Act of 1950 which had no counterpart in the Price Control Act of 1942.

The court then quoted Section 709, italicizing the last clause which provides that:

> but no such rule, regulation, or order shall be invalid by reason of any subsequent finding by judicial or other authority that such a statement is inaccurate.[34]

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fected by such regulation or order, and shall give consideration to their recommendations.

[34] Section 404 of the 1950 Act also provides:

> In carrying out the provisions of this title, the President shall, so far as practicable, advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders issued hereunder.

This section does not contain the provision, such as that in Section 709, for "a statement" that there has been

VI. THE RESIGNATION IN DECEMBER, 1952, OF THE INDUSTRY MEMBERS OF THE WAGE STABILIZATION BOARD HAS NO RELATIONSHIP TO THIS PROCEEDING

It is argued by appellee that "the collapse of the tripartite Wage Stabilization Board destroyed the statutory scheme for administration of wage controls." (Br. p. 70).

On December 6, 1952, the Chairman of the Wage Stabilization Board in Washington resigned and, on the same day, the industry members of the Board also resigned. On December 15, 1952, the Economic Stabilization Administrator designated the remaining public members of the Board as the Wage Stabilization Committee. General Order 19, 17 F. R. 11368. The stated purpose of this order was to provide an interim administration of the wage stabilization program while the Board was rendered inoperative by the resignation of the industry members. The interim administration was to terminate as soon as the Board was again rendered operative by the appointment of industry members.

The change in the organization of the wage stabilization agency is irrelevant here. The only functions which the statute required to be per-

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consultation with industry representatives, and, we submit, was purely precatory or directory, not mandatory. In any event, for the reasons set forth above, Section 404, like Section 709, could not appropriately be applied to general procedural or wage regulations.

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formed by a tripartite board are defined in Section 403 (b) (5) of the Act as follows:

> (5) The Board shall, under the supervision and direction of the Economic Stabilization Administrator—
>
> (A) formulate, and recommend to such Administrator for promulgation, general policies and general regulations relating to the stabilization of wages, salaries, and other compensation; and
>
> (B) upon the request of (i) any person substantially affected thereby, or (ii) any Federal department or agency whose functions, as provided by law, may be affected thereby or may have an effect thereon, advise as to the interpretation, or the application to particular circumstances, of policies and regulations promulgated by such Administrator which relate to the stabilization of wages, salaries, and other compensation.
>
> For the purposes of this Act, stabilization of wages, salaries, and other compensation means prescribing maximum limits thereon. Except as provided in clause (B) of this paragraph, the Board shall have no jurisdiction with respect to any labor dispute or with respect to any issue involved therein. * * *

Although this subsection vests the authority to issue general wage stabilization regulations in the tripartite board, nothing in the law requires the use of such a board as a part of the enforcement

machinery in wage stabilization cases. Section 405 (b) grants to the President the authority to enforce wage stabilization by disallowances, and Section 703 authorizes him to delegate such authority, without in any way limiting him to the Wage Stabilization Board.

Furthermore, this proceeding was instituted on November 4, 1952, on behalf of the tripartite board prior to the Board's reorganization in December, 1952 (R. 3, 10). The case was to be heard by the National Enforcement Commission, a separate component of the Economic Stabilization Agency from the Wage Stabilization Board. The case was to have been prosecuted, if it had been allowed to go on, by a regional attorney for the Wage Stabilization Board or its successor. But no further action by the Board itself was necessary.

Appellee does not appear to claim that a tripartite board must necessarily participate in the enforcement process. Its argument seems to be that only such a board could rule on contentions that appellee's wage increases were authorized under the applicable regulations or could have given an interpretation as to the application of the regulations in the particular circumstances. And it is said that such advice from the Board might have precluded the commencement of the enforcement proceeding.

But the fact that an agency was not available to "*advise* as to the interpretation, or the applica-

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tion to particular circumstances" of the regulations plainly does not mean that they cannot be enforced by other agencies having enforcement authority. If this were not the case no statute subject to administrative interpretation could be enforced after it had expired, despite the general saving statute and other saving provisions, which prove the contrary.[35]

Even if appellee's contention were not defective for all of the reasons stated above, it would lack substance. It amounts to a suggestion that an industry or labor boycott of a tripartite Board automatically cuts off the agency's power to function without regard to the importance of the continuance of that function in the public interest. Where such a boycott or withdrawal occurs, an interim administration must be provided, as it was here, to protect the public. Even if such an interim administration be considered as not free to engage in new matters, it clearly would have the power to continue proceedings authorized by the tripartite Board.

VII. THE REGULATIONS ARE NOT INVALID AS RETROACTIVE

Appellee argues (Br. pp. 74–76) that the regulations would be invalid as applied to wage increases occurring before June, 1951, when the Wage Stabilization Board's resolution prescrib-

[35] Here the executive order terminating substantive controls specifically saved the procedure for administrative enforcement. Executive Order No. 10434, 18 F. R. 809.

ing enforcement procedure was issued. But the substantive wage stabilization regulation which fixed the maximum wage level was issued on January 26, 1951 (16 F. R. 816), prior to any of the alleged violations. See p. 4, main brief. The fact that it took some time to set up the agency necessary to administer the controls, including the enforcement machinery, did not mean that the appellee was suffering penalties for conduct which it did not know was illegal. Moreover, the regulation merely implemented the statute, which itself authorizes the imposition of an appropriate disallowance in the event of violation of the substantive regulation. The fact that the amount to be disallowed would not be determined until after the circumstances of the case had been developed in the administrative proceeding did not constitute the imposition of a penalty improperly retroactive, any more than does the defendant's uncertainty in an ordinary case as to the amount of the fine or damages which may ultimately be imposed by a tribunal having discretionary authority.

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CONCLUSION

For the reasons set forth herein as well as for the reasons set forth in our main brief, we respectfully submit that the judgment below should be reversed.

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MARCH 1954.

U. S. GOVERNMENT PRINTING OFFICE 51-74